Supreme Court, U.S.
FILED
DEC 16 1997
CLERK

No. 97-747

In The

Supreme Court of the United States

October Term, 1997

OUIDA SUE PARKER,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, SCHERING-PLOUGH CORPORATION and SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS SCHERING-PLOUGH CORPORATION AND SCHERING-PLOUGH HEALTH CARE PRODUCTS, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does a totally disabled individual have standing to sue under Title I of the Americans with Disabilities Act, which is intended to protect only "qualified individuals with a disability" who are able to "perform the essential functions of a job"?

2. Does Title III of the Americans with Disabilities Act, which governs equal access to places of public accommodations for the disabled, regulate the content of the goods and services provided by places of public accommodations and thereby require that employers who offer their employees long term disability benefits provide the same benefits for physical and mental disorders?

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed in the Petition at ii. Respondent Schering-Plough Health Care Products, Inc. is a wholly-owned subsidiary of Schering-Plough Corporation. There are no other parent company or non-wholly owned subsidiaries of Respondents Schering-Plough Corporation and Schering-Plough Health Care Products, Inc.

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For the Court's convenience, citations to the *en banc* and panel opinion in this opposition brief will be to the page numbers of the opinions attached to the Petition as Appendix A.

INTRODUCTION

Petitioner Ouida Sue Parker petitions this Court to rewrite the Americans with Disabilities Act (the "ADA") by expanding its coverage to those who cannot perform the essential functions of any job, even with reasonable accommodation. The Petitioner further seeks to have this Court mandate that employers and insurers provide equal benefits for mental and physical disabilities, in spite of the fact that the ADA plainly contains no such requirement and Congress never intended such a result. Finally, Petitioner would have this Court eliminate any distinction between Title I and Title III of the ADA by applying the provisions of Title III of the ADA to employers in contravention of the clear Congressional intent.

The Petition presents no issues that warrant immediate review by this Court. The decision of the Sixth Circuit properly rejected Petitioner's invitation to expand the scope of Title I and Title III of the ADA beyond the plain meaning of the statute and the clear intent of Congress. Moreover, the Petition does not advance a significant conflict between decisions of circuit courts. Finally, as the Sixth Circuit noted in its decision *en banc*, Congress has recently passed the Mental Health Parity Act, 42 U.S.C.

§ 300gg-5, which suggests that Congress did not regard the ADA as a mechanism to regulate the content of insurance policies or to mandate parity of benefits in such policies. Health care reform remains an issue of national concern. The Court should not grant certiorari to resolve a policy issue with implications for employers and insurance companies that are uncertain and potentially far-reaching.

STATEMENT OF THE CASE

Petitioner is totally disabled by a major depression and is unable to perform the essential functions of any job. By virtue of her employment with Respondent Schering-Plough Health Care Products, Inc., Petitioner was a participant in a long-term disability plan (the "Plan") that was written and issued by Respondent Metropolitan Life Insurance Company ("MetLife") to her employer. The Plan provided twenty-four months of long-term disability benefits for mental or nervous disorders. For other disorders, the Plan provided continuous disability payments until age 65. App. at 75.

In accordance with the terms of the employer-sponsored plan, Petitioner received long-term disability benefits for twenty-four months. After the benefits terminated in accordance with the Plan, Petitioner brought suit against the Schering-Plough Respondents and Respondent MetLife. Petitioner seeks this Court's review of her claim that the terms of the Plan violate the Americans with Disabilities Act (the "ADA") because of the disparity in the benefits provided for physical and mental conditions.

The district court held that Petitioner lacked standing to maintain claims against the Respondents under Title I of the ADA because she was not a "qualified individual with a disability" who could perform the essential functions of her job. App. at 80-81. The district court also dismissed Petitioner's Title III claims against the Schering-Plough Respondents on the ground that Title III does not govern employment practices. In doing so, the district court referred to the legislative history of Title III which states that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by Title I of this legislation." App. at 84. As to both the Schering-Plough Respondents and MetLife, the district court also held that Title III of the ADA prohibits discrimination on the basis of disability only with respect to an individual's ability to make physical use of goods, services, facilities, privileges, advantages or accommodations of places of public accommodation. App. at 83-84.

Petitioner appealed to the Sixth Circuit. On October 25, 1996, a panel of the Sixth Circuit affirmed the district court's ruling that Petitioner lacked standing to maintain an action under Title I of the ADA against the Respondents because she was not a "qualified individual with a disability." App. at 51. The Sixth Circuit panel, however, reversed the district court's ruling with regard to the Title III issue. App. at 69-70.

Respondents Schering-Plough and MetLife filed petitions for rehearing *en banc* solely with regard to the panel's rulings on Title III. Petitioner opposed the petitions for rehearing but did not request rehearing on any

other issue. App. at 7. Thus, Petitioner's claims under Title I of the ADA were not before the *en banc* court and accordingly, the *en banc* court did not address the Title I issues. App. at 5.

The Sixth Circuit *en banc* ruled that a long-term disability plan obtained through an employer is not a public accommodation. The *en banc* court found that the plain words of the statute limit Title III's reach to the provision of unequal or separate benefits by places of public accommodation. Because the benefits challenged by Petitioner were provided to her by virtue of her employment and not at a place of public accommodation, the court reasoned that the benefit plan she received from her employer was not a good or service offered by a place of public accommodation. App. at 13-16. The *en banc* court further ruled that Title III does not govern the content of a long-term disability plan offered by an employer because Title III regulates availability of the goods and services offered by a place of public accommodation and does not govern content. App. at 13. Moreover, the *en banc* court ruled that Title IV does not address the contents of a long-term disability plan offered by an employer because the employer is not a place of public accommodation. App. at 15-17. Finally, the *en banc* court ruled that Title III does not govern the terms and conditions of the employment relationship. App. at 20-22.

Petitioner filed for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT PETITIONER COULD NOT MAINTAIN AN ACTION UNDER TITLE I.

A. Petitioner Is Not a Qualified Individual With a Disability.

The Sixth Circuit panel decision properly found that Petitioner lacked standing to pursue claims against the Schering-Plough Respondents under Title I because she is not a "qualified individual with a disability."[1] Title I of the ADA prohibits employment discrimination against a "qualified individual with a disability" because of the disability. 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Only qualified individuals can maintain a claim under Title I.

The panel's decision is also supported by the legislative history and announced Congressional purpose of the ADA. Congress included the phrase "essential functions" in the definition of a qualified individual with a disability to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, *i.e.*, the non-marginal functions of the job. . . . " H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. 55 (1990). Significantly, Petitioner

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[1] As noted above, the Title I issue was not before the *en banc* court because no party sought rehearing on that issue.

cites no legislative history of the ADA that even hints that Congress intended Title I to protect any persons other than qualified individuals with disabilities as that term is defined in the statute. In fact, the legislative history of the ADA clearly and uniformly states that Congress intended Title I to prohibit discrimination against *qualified* individuals with disabilities.[2] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 25-29 (1989); H.R. Rep. No. 485, part 2, 101st Cong., 2d Sess. 54-60; H.R. Rep. No. 485, part 3, 101st Cong., 2d Sess. 31-39 (1990); *see also Gonzales v. Garner Food Servs.*, 89 F.3d 1523, 1527 (11th Cir. 1996) (review of ADA and legislative history indicates that Congress intended to limit Title I protections to persons who could perform the essential functions of a job) , *cert. denied*, 117 S. Ct. 1822 (1997). Thus, as the Sixth Circuit panel court recognized, the legislative purpose of Title I

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[2] This purpose differentiates the ADA from other federal and state legislation that is designed to provide benefits to individuals who *cannot* work. For example, in order to be entitled to receive benefits under the Social Security Act, 42 U.S.C. § 310 *et seq.*, a claimant must certify not only that she suffers from a mental or physical impairment that renders her unable to perform her previous work, but also that the impairment prevents her from engaging in any other kind of substantial gainful work. *See* 42 U.S.C. § 423(D)(2)(A). Similarly, workers' compensation statutes are designed in large part to protect workers who are unable to perform any work, whether temporarily or permanently. *See, e.g., Smith v. Tennessee Furniture Industries, Inc.*, 369 S.W.2d 721 (Tenn. 1963). Unlike the Social Security Act and workers' compensation laws, Title I of the ADA exists solely to ensure that people with a disability who *can* work are given the opportunity to do so. Consequently, it violates neither the language nor the spirit of the ADA to hold that Petitioner is not entitled to its protection.

of the ADA was to ensure that the disabled could obtain and keep employment. App. at 49. While the ADA generally seeks to protect individuals with disabilities, Congress deliberately restricted that protection in the workplace context to the disabled who are able to work, with an accommodation, if necessary. *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994).

Thus, the panel's ruling that Petitioner, who by her own admission is totally disabled from working at any job by severe depression, is not a "qualified individual with a disability," is consistent with the plain meaning of the statute and consonant with Congress's clear intent to confine the protection of Title I to employees who are able to perform the essential functions of their job.

Contrary to Petitioner's argument, the panel's reliance on *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988), was not misplaced. In *Beauford*, the Eighth Circuit found that an employee who was totally disabled and could no longer perform the essential functions of her job was not entitled to maintain a claim for fringe benefits under Section 504 of the Rehabilitation Act of 1973. The Eighth Circuit recognized that the Rehabilitation Act reached discrimination in fringe benefits but determined that the plaintiff was not entitled to the protection of the Rehabilitation Act because the Act only extended its coverage to "otherwise qualified handicapped individuals." 831 F.2d at 770 (quoting 29 U.S.C. § 794) (emphasis omitted). Because the plaintiff in *Beauford* admitted that she was wholly unable to meet the defendant's job requirements "in spite of her handicap," the Court denied her claim for

fringe benefits. *Id.* at 771. In so holding, the Eighth Circuit stated that "though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of section 504." *Id.*

The Sixth Circuit panel properly relied on the compelling reasoning of the *Beauford* court. Like the *Beauford* plaintiff, Petitioner is totally disabled and is not a "qualified individual with a disability." Petitioner's argument that "*Beauford* differs from this action because the Rehabilitation Act does not specifically address discrimination in contractual relationships" is unavailing. Pet. at 22. Contrary to Petitioner's assertion, both statutes are similar in their language and in their proscription of discrimination based on disability even with respect to fringe benefits.[3]

In any event, the Sixth Circuit panel did not rely solely on *Beauford* to determine that Petitioner lacked standing under Title I of the ADA. The court also found support in decisions of the Seventh and Eleventh Circuits, which have also concluded that totally disabled individuals who cannot perform the essential functions of their jobs do not have standing to challenge their employer-provided benefit plans under Title I of the ADA. *EEOC v.*

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[3] Both the ADA and the Rehabilitation Act require that in order to be entitled to their protection, an individual must otherwise be qualified to perform the essential functions of her job. *Compare* 29 U.S.C. § 794 (discrimination prohibited only against "otherwise qualified handicapped individuals") *with* 42 U.S.C. § 12112(a) and 29 C.F.R. § 1630.2(m) (discrimination prohibited only against a "qualified individual with a disability").

CNA Insurance Cos., 96 F.3d 1039, 1043-44 (7th Cir. 1997); *Gonzales v. Garner Food Servs.*, 89 F.3d 1523 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 1822 (1997).

To circumvent the import of the statutory language and legislative history of Title I, Plaintiff has advanced one tortuous construction of the statute after another. For example, despite the fact that nothing in the statute confers standing to the totally disabled, Petitioner attempted to persuade the Sixth Circuit panel that it should overlook her inability to work and find that she was entitled to protection under Title I to preserve her "employment position" as a "benefit recipient." The panel court refused to create an entirely new category of employees entitled "benefit recipients" and found instead that Petitioner's construction of the statute conflicted with the plain meaning of its words. App. at 51. The Seventh and Eleventh Circuits have also rejected this construction. *CNA Ins. Cos.*, 96 F.3d at 1043 ("an employment position is a job"); *Garner Food Servs.*, 89 F.3d at 1530. This agreement among circuit courts that Title I applies only to those who can fulfill the essential functions of the job at issue is yet another reason for the Court to refrain expending its limited resources by reviewing Petitioner's Title I claim.

Changing tactics, Petitioner now urges this Court to apply the reasoning of its recent decision in *Robinson v. Shell Oil*, 117 S. Ct. 843 (1997), to manufacture standing for those who are not qualified individuals with disabilities under Title I. Petitioner resorts to the argument that "the Sixth Circuit should have examined the issue of Petitioner's right to bring suit under Title I in the context of the ADA's broader meaning and purpose of the statute as a whole." Pet. at 24. Petitioner supports this expansion

of the scope of Title I by citing the preamble to the statute while disregarding the specific provisions enacted by Congress to address discrimination against the disabled. Pet. at 24. According to Petitioner, the Court must review this case to "extend to the ADA the same principles of statutory construction to secure civil rights within the full intent of Congress which were applied in Robinson." Pet. at 23. Petitioner is wrong. Nothing in the ADA or recent circuit court decisions supports intervention by this Court to expand the scope of Title I beyond the rights that Congress plainly intended to secure, and the reasoning of the *Robinson* decision is similarly unpersuasive on this issue.

In *Robinson*, the Court determined that former employees could pursue claims against their employers for discrimination under the anti-retaliation provision of Title VII. 117 S. Ct. at 849. The Court found that the term "employees" as used in Title VII was ambiguous and that the "broader context" of Title VII implied that the anti-retaliation provisions of the statute should be extended to include former employees. *Id.* at 848.

The Court's decision in *Robinson* does not advance Petitioner's contention that a totally disabled individual has standing to maintain an action under Title I of the ADA. The decision below was not based on whether Petitioner was a current or former employee, and consideration of her employment status was not necessary to the determination that she was not entitled to the protections of Title I. Further, unlike Title VII, the application of the ADA's protection is not determined merely by reference to the word "employee." In the ADA the meaning of "employee" is not ambiguous because Congress imposed

specific requirements that must be met by those seeking protection under Title I of the statute. The ADA establishes that an employee's current[4] ability to perform the essential functions of the job as defined by the employer is a threshold requirement for invoking ADA protection. 42 U.S.C. § 12111(8). Title VII contains no such requirement. Thus, the Court's analysis in *Robinson* has no relevant application to the Title I issue in this action.

Petitioner implores this Court to apply the "broader context" of the statute at the expense of its unambiguous language and clear Congressional intent. Petitioner's shifting constructions of Title I are best disposed of by applying the elemental rule of statutory construction: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous . . . that language must ordinarily be regarded as 'conclusive.' " *Reves v. Ernst & Young*, 507 U.S. 170, 113 S. Ct. 1163, 1169 (1993) (citations omitted); *see also Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986) (the "purpose" of a statute is determined first by

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[4] Petitioner's attempt to analogize the ADA to Title VII by claiming that the ADA contains no "temporal qualifier" in its definition of "employee" is simply wrong. The ADA specifically extends the protection of Title I to qualified individuals with a disability "who, with or without reasonable accommodation, *can* perform the essential function of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis added); *see also* 29 C.F.R. § 1630.2(m). The actual ability to come to work and perform the essential functions of the job are paramount to the determination of whether an employee is "qualified" under the ADA. *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 213 (4th Cir. 1994).

examining its plain language). Despite the broad pronouncement of the statute's preamble (42 U.S.C. § 12101), an examination of the statute's language and the legislative history demonstrates that Congress did not extend protection to all disabled employees. No doubt as a result of the inevitable compromise of legislators with disparate agendas and constituencies, the protection afforded by Title I of the ADA was expressly limited to individuals who are able to work, with or without a reasonable accommodation. In sum, when Congress enacted the ADA it simply did not provide the protection that Petitioner seeks.

It is Petitioner's construction of Title I that is demonstrably at odds with the language and Congressional intent expressed in the statute. The Sixth Circuit panel's thoughtful analysis of the issue was eminently correct and presents no basis for review by this Court. Petitioner is not a qualified individual with a disability and lacks standing to maintain her action under Title I. It is not incumbent upon this Court to rewrite the ADA.

B. Even If Petitioner Had Standing Under Title I of the ADA, the Terms of the Plan Do Not Violate the ADA by Providing Disparate Benefit Levels.

Petitioner argues that the terms of the Plan, which provide for long-term disability benefits until age 65 for physical disabilities but which limit such benefits for mental disabilities to two years, violate the ADA. Even if Petitioner had standing under Title I of the ADA, however, the Sixth Circuit's decision is plainly correct because

providing disparate levels of benefits to different classes of disabled individuals does not violate the ADA.

Congress enacted the ADA to prevent employers from completely denying coverage based on an individual's disability. The legislative purpose and history of the ADA confirm that the ADA ensures only that disabled employees are given the same access to the benefits offered by an employer as those offered to able-bodied employees. Thus, distinctions in the level of benefits provided for different conditions do not constitute discrimination if such distinctions are applied equally to all employees.[5] Congress addressed precisely this issue with regard to an employer who offers lesser benefits for mental as opposed to physical impairments:

> [W]hile it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified amount per year for mental health coverage, a person who has a mental health condition may not be denied coverage for other conditions such as for a broken leg or for heart surgery because of the existence of the mental health condition. . . . All people with disabilities must

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[5] The Equal Employment Opportunity Commission's own interpretive guidance of the ADA supports the Congressional intent to ensure that the disabled are provided equal access to benefits by their employers. *See EEOC Compliance Manual (BNA)* at 70:1052-53 (noting that distinctions between mental and physical conditions in the benefits provided by employers "constrain individuals both with and without disabilities" and "do not intentionally discriminate on the basis of disability.") .

> have equal access to the health insurance coverage that is provided by the employer to all employees.
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> *S. Rep. No. 116, 101st Cong., 1st Sess., at 29; see also H.R. Rep. No. 485, part 3, 101st Cong., 2d Sess., at 71.*

The Supreme Court has held in Rehabilitation Act cases[6] that a disparity in the benefits offered for mental health conditions and physical conditions does not create a cognizable claim of discrimination against the disabled. *Traynor v. Turnage,* 485 U.S. 535 (1988); *Alexander v. Choate,* 469 U.S. 287 (1985). The Sixth Circuit in this case, and the Seventh Circuit and the Eighth Circuit have properly extended the same rationale used by this Court in *Traynor* and *Alexander* in their determination that employers do not violate the ADA by offering unequal benefits for mental and physical conditions. *See CNA Ins. Cos.,* 96 F.3d at 1044 (7th Cir. 1996); *Krauel v. Iowa Methodist Medical Center,* 95 F.3d 674 (8th Cir. 1996) (holding that employee benefit plan that did not provide coverage for treatment of infertility did not violate the ADA because the exclusion of such treatment applied to all employees).

In *Alexander v. Choate,* the Court held that the state of Tennessee did not violate section 504 of the Rehabilitation Act by reducing the number of in-patient days for which Medicaid would reimburse hospitals on behalf of a single recipient in a fiscal year. 469 U.S. at 309. The Court

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[6] Cases brought pursuant to the Rehabilitation Act are instructive as to the ADA. *See* 42 U.S.C. § 12117(b) (ADA and Rehabilitation Act to be construed so as not to achieve inconsistent or conflicting standards).

rejected the argument that such a reduction violated section 504 of the Rehabilitation Act by affecting the disabled more severely than those without disabilities and stated that the Rehabilitation Act "does not . . . guarantee the handicapped equal results from the provision of state Medicaid." *Id.* at 304. Instead, the Court noted, "section 504 seeks to assure even-handed treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Id.* at 303. In *Traynor v. Turnage,* this Court subsequently held that a regulation permitting veterans to receive education assistance benefits beyond a ten-year period only if the mental or physical disability which prevented the veteran from completing his education was "not the result of [his] own willful misconduct" did not violate the Rehabilitation Act. The Court in *Traynor* specifically stated that the "central purpose of § 504 . . . is to assure that handicapped individuals receive 'even-handed treatment' in relation to non-handicapped individuals." *Id.* at 548 (citations omitted). The Court further stated that "[t]here is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.* at 549.

The legislative goal of the ADA mirrors that of the Rehabilitation Act. The ADA provides the disabled with equal access to benefits – not equal results. As a consequence, distinctions in insurance coverage that are equally applied to all employees do not intentionally discriminate on the basis of disability. The Sixth, Seventh and Eighth Circuits agree. These courts have uniformly ruled that the language and the legislative history of the

ADA do not evince an intent on the part of Congress to mandate parity in the benefits provided for mental and physical conditions.

Petitioner is not a victim of disability discrimination. As the Sixth Circuit *en banc* noted, "[b]ecause all employees at Schering-Plough, whether disabled or not, received the same access to the long-term disability plan, neither the defendants nor the plan discriminated between the disabled and the able bodied." App. at 23. Disabled employees were not charged more for the benefits that they received under the Plan and they could receive benefits under the same terms as employees who were not disabled.

Congress simply failed in enacting the ADA to mandate parity in the benefits provided to employees. Although Petitioner's situation may be one that evokes sympathy, Petitioner cannot properly ask this Court to rewrite the ADA. In *EEOC v. CNA* the Seventh Circuit succinctly observed:

> Without far stronger language in the ADA supporting this result, we are loath to read into it a rule that has been the subject of vigorous, sometimes contentious national debate for the last several years. Few, if any, mental health advocates have thought that the result they would like to see has been there all along in the ADA.

96 F.3d at 1044.

As the Sixth Circuit *en banc* noted, the recent passage of the Mental Health Parity Act, "suggests Congress believed that the ADA neither governs the content of insurance policies nor requires parity between physical

and mental illnesses. . . . " App. at 29. In passing the Mental Health Parity Act, which amends the Health Insurance Portability Act, Congress eliminated some of the distinctions between benefits offered for mental and physical conditions. For example, when a group health insurance plan does not have an annual or lifetime limit on the benefits offered for physical conditions, it may not contain such a limitation for mental health benefits.[7] 42 U.S.C. § 300gg-5(1)-(2). Logically, Congress would not have enacted the Mental Health Parity Act if the precise relief that Petitioner seeks, *i.e.*, required parity in the benefits for mental and physical illnesses in employer-provided insurance, had been provided under the ADA. Certiorari should not be granted to unravel an issue that remains the subject of Congressional consideration.

C. Petitioner's Assertion That Regulations Promulgated by the Equal Employment Opportunity Commission Interpreting Title I of the ADA Conflict With the Sixth Circuit Panel's Decision Does Not Provide a Proper Ground for Review by This Court.

Petitioner argues that the Sixth Circuit panel failed to accord the proper deference to regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") that interpret Title I of the ADA. The Sixth Circuit panel properly relied on the plain meaning of the statute rather than Petitioner's erroneous interpretation of the EEOC's regulations.

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[7] The Mental Health Parity Act does not have any effect on long term disability plans such as the one Petitioner challenges.

According to Petitioner's expansive interpretation, the EEOC's regulations provide that "an individual's present ability to perform the essential functions of his or her job is irrelevant" to the determination of whether the individual has standing to pursue an action under Title I of the ADA. Pet. at 27. A review of the actual language of the provisions cited by Petitioner reveals that Petitioner's interpretation is a mere chimera that is entitled no deference by this Court. For example, 29 C.F.R. § 1630.4(f) merely provides that covered entities may not discriminate against a *qualified individual with a disability* with regard to the "fringe benefits available by virtue of employment, whether or not administered by the covered entity," while 29 C.F.R. § 1630.13(b)[8] prohibits employers from requiring medical examinations of employees or making inquiries with regard to the nature or severity of a disability. The cited regulations clearly do not support the expansion of those who may bring actions under Title I to persons who are unable to work.

Thus, the alleged conflict between the Sixth Circuit's decision and the EEOC's regulations does not warrant review. The regulations cited by Petitioner are not truly in conflict with the Sixth Circuit's interpretation of Title I or with the express language of the statute. Even if the cited EEOC regulations had actually supported Petitioner's

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[8] 29 C.F.R. § 1630.13(b) states:

> Examination or inquiry of employees. Except as permitted by § 1630.14, it is unlawful for a covered entity to require a medical examination of an employee or to make inquiries as to whether an employee is an individual with a disability or as to the nature or severity of such disability.

argument that her complete inability to work is irrelevant under Title I, the Sixth Circuit would not owe any deference to an erroneous interpretation of a Congressional statute. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (holding that "no deference is due to agency interpretations at odds with the plain language of the statute itself").

II. PETITIONER EXAGGERATES THE SIGNIFICANCE OF ANY CONFLICT BETWEEN THE FIRST AND SIXTH CIRCUITS ON THE TITLE III ISSUE.

Petitioner relies heavily on a purported conflict between the Sixth Circuit and a decision of the First Circuit. Pet. at 9-15. Petitioner overstates the significance of the conflict. Moreover, the analysis of the First Circuit is flawed and should be disregarded.

In *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Assoc.*, 37 F.3d 12 (1st Cir. 1994), the First Circuit determined that the meaning of the term place of "public accommodation" in Title III is not limited to physical structures. 37 F.3d at 19. Citing technological advances in the means of conducting commercial activity, the First Circuit found that Title III applies even when a disabled person merely makes a request over the telephone. *Id.* The First Circuit did not even reach the precise issue addressed by the Sixth Circuit *en banc*, namely whether Title III applies to regulate the content of the products or services offered by places of public accommodation. 37 F.3d at 20. Thus, the First Circuit's decision, which solely addresses the issue of the disabled's access

to the goods and services of places of public accommodation is inapposite.

What is really at issue here is whether Title III permits the regulation of the content of the goods and services offered by places of public accommodation. As noted above, the legislative history of the ADA clearly explains that Congress merely intended to provide equal access to the goods and services offered by places of public accommodation. Petitioner has not presented the Court with a manifest conflict between circuit courts.[9] As a consequence, it would be premature for the Court to expend its resources to settle a variance that may be resolved by further developments among the circuit courts and lower courts.

In any event, the First Circuit's interpretation of the meaning of Title III is flawed and inconsistent with the plain meaning of the statute. The Sixth Circuit correctly concluded that Petitioner did not have a claim under Title III because the prohibitions of Title III only apply to "places of public accommodation." App. at 17-20. The

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[9] Petitioner cites several district court cases which she contends have addressed Title III's "applicability to discrimination in the provision and coverage of insurance. . . ." Pet. at 14. The existence of these cases, whatever the true import of their holdings, is not determinative of the propriety of granting the Petition. The Court expends its resources when there is a conflict among the circuit courts calling for review. Supreme Court Rule 10(a). Supreme Court review is not warranted to correct district court decisions. Instead, the Court should exercise its discretion and refrain from reviewing this issue until it is presented with a real conflict among circuit courts.

statute provides a list of physical locations as examples of places of public accommodation, without any reference to the content of the services offered by such places. 42 U.S.C. § 12181(7). This interpretation is confirmed by the legislative history of Title III which clarifies that Congress's express purpose in enacting Title III was to provide disabled persons with the same access to the goods and services offered by places of public accommodation as persons who are not disabled enjoy. *See, e.g.*, H.R. Rep. No. 485, 101st Cong., 2d Sess., at 35; S. Rep. No. 116, 101st Cong., 1st Sess., at 58.

The Sixth Circuit also relied on its previous decision in *Stoutenborough v. National Football League*, 59 F.3d 580 (6th Cir.), *cert. denied*, 116 S. Ct. 674 (1995), which found that Title III plainly applied only to physical places and that television broadcasts of blacked out football games do not involve a "place of public accommodation." 59 F.3d at 583. Thus, relying on the plain meaning of the statute, its legislative history and Sixth Circuit precedent, the Court reasoned that the plain meaning of the text of Title III refers solely to physical places.

III. PETITIONER'S CLAIM THAT THE JUSTICE DEPARTMENT'S INTERPRETATION OF TITLE III CONFLICTS WITH THE SIXTH CIRCUIT'S *EN BANC* DECISION DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner argues that selected language from the Department of Justice Technical Assistance Manual suggests that Title III permits the regulation of the substantive terms of insurance contracts. *See Department of Justice*

Technical Assistance Manual, § III-3.11000 *reprinted in Americans with Disabilities Act Manual (BNA)* at 90:0917. According to Petitioner, the Sixth Circuit did not give this interpretation of Title III the deference due to agency interpretations[10] under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The fundamental principle in the construction of statutes is that a court must give effect to the plain meaning of the statute's words. When the statute's meaning is plain and Congress has expressed its intent in unambiguous terms, a reviewing court need not defer to an agency's contrary interpretation of the statute. *Dole v. United Steel Workers*, 494 U.S. 26, 42-43 (1990); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). The principle of *Chevron* deference does not permit an agency to nullify through interpretation the clearly expressed intent of Congress.

Applying these principles, the Sixth Circuit correctly determined that the Department of Justice's interpretation of Title III to include the regulation of the content of insurance products did not merit deference. That interpretation is inconsistent with the express language of the

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[10] Other language in the same *Department of Justice Technical Manual* supplies an interpretation of Title III that is inconsistent with the language cited by Petitioner. The Department of Justice also opines in conformity with its own regulations that "[a]s a general rule, a public accommodation is not required to alter its inventory to carry accessible or special products that are designed for or are easier to use by customers with disabilities." *Department of Justice Technical Assistance Manual* § III 4.2500 *reprinted in Americans with Disabilities Act Manual (BNA)* at 90:0921. *See, e.g.*, 28 C.F.R. Part 36 (App. B) at 630.

ADA and ignores the guidance provided by Congress in the legislative history of the statute. App. at 13-14. The language of Title III clearly expresses Congress's intent to proscribe discrimination against the disabled "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of any place of public accommodation*. . . . " 42 U.S.C. § 12182(a) (1994) (emphasis supplied). Title III's framework is such that it is mainly descriptive of equality in the access to the physical facilities that it defines as "places of public accommodation." 42 U.S.C. § 12182. The actual words in the provision do not refer in any way to the content of the goods and services offered by the places of public accommodation.

Logically, if Congress had such an intent it could easily have used the precise words that would support the regulation of the content of the affected goods and services. Moreover, it is unlikely that Congress would have enacted a measure that would impose tremendous costs on business without any debate. Yet, a review of the legislative history shows that no such debate occurred. The fact that the potential for using Title III of the ADA to regulate the content of the goods and services offered by places of public accommodation was not even debated by Congress indicates that Congress was fully aware that Title III would have no such effect.

The Sixth Circuit owed no deference to the Department of Justice's impermissible construction of Title III since Congress clearly intended to limit the reach of Title III to providing the disabled with the opportunity for full

participation in, and access to, places of public accommodation. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508-09 (1992).

IV. THE SIXTH CIRCUIT'S HOLDING THAT TITLE III DOES NOT APPLY TO EMPLOYERS IS CORRECT.

The Sixth Circuit properly ruled that the Schering-Plough Respondents cannot be held liable under Title III of the ADA because "discrimination in the provision of fringe benefits during employment is governed strictly by Title I. . . . " App. at 22. As the Sixth Circuit ruled, Title III expressly does not govern the terms and conditions of employment by providers of places of public accommodation. *Id.* This ruling is supported by the legislative history of Title III which specifically and unambiguously states that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by Title I of this legislation." Rep. No. 116, 101st Cong., 1st Sess. 58 (1989).

It is no accident that Congress entitled Title III "Public Accommodation and Services Operated by Private Entities." Title III explicitly pertains to the conduct of places of public accommodation in providing services. The plain language of Title III does not comprehend employment practices, and there is no textual basis for asserting a cause of action under Title III arising from the employment relationship.

On the other hand, Title I defines a comprehensive scheme for addressing discrimination against the disabled in the terms, conditions and privileges of employment. This scheme applies exclusively to employment and it encompasses the very claims that Petitioner asserted below. Many of Title I's provisions would be rendered superfluous if this Court were to decide that claims against employers who provide disability benefits through third parties are cognizable under Title III. Moreover, any employer who purchased a disability plan and offered its employees the opportunity to participate in it could be subject to suit under both Title I and Title III. It follows that such an employer who was not liable under Title I because the employee was not a "qualified individual with a disability," would still be subject to liability under Title III, which does not apply the same standing requirement.

There is an additional incongruity. Title I of the ADA incorporates the procedures of Title VII of the Civil Rights Act of 1964, including its exhaustion requirements. 42 U.S.C. § 12117(a). If actions based on the employment relationship were also cognizable under Title III, a disabled employee could circumvent the exhaustion requirements of Title I by bringing his disability claim under Title III. In many cases, the exhaustion requirements of Title I would be rendered irrelevant.

Petitioner does not directly address this ruling, no doubt because no authority exists to refute the above unequivocal statement of legislative intent. Her claims against the Schering-Plough Respondents arise from the employment relationship, which Congress has exclusively covered by Title I of the ADA. As a consequence,

this Court should not review the ruling that the Schering-Plough Respondents cannot be held liable to Petitioner under Title III of the ADA.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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